No. _____

Supreme Court, U.S.
FILED
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In The Supreme Court of the United States

BENNY R. EDWARDS,

Petitioner,

v.

VIRGINIA INTERNATIONAL TERMINALS, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit err in deciding that attorneys' fees can only be awarded against employers in favor of counsel for claimants under the Longshore and Harbor Workers' Compensation Act where an informal conference has been held?

PARTIES BELOW

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UNITED STATES DEPARTMENT OF LABOR,

Respondent

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Decision of the United States Court of Appeals for the Fourth Circuit on Petition for Rehearing and Rehearing *En Banc* dated April 14, 2005: Virginia International Terminals, Inc. v. Benny R. Edwards; Director, Office of Workers' Compensation Programs, United States Department of Labor, No. 04-1338 (April 14, 2005) (Appendix A).

STATEMENT OF JURISDICTION

This case arose under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq. (the "LHWCA" or the "Act"). The Administrative Law Judge had jurisdiction to hear the claim pursuant to 33 U.S.C. §§ 919 (c) & (d). The Benefits Review Board had jurisdiction to hear the appeal from the Administrative Law Judge's decision, pursuant to 33 U.S.C. § 921 (b) (3). Jurisdiction was proper before the United States Court of Appeals for the Fourth Circuit upon petition for review from the Benefits Review Board, pursuant to 33 U.S.C. § 921 (c).

The United States Court of Appeals for the Fourth Circuit rendered its decision in this case on February 16, 2005. Thereafter, Petitioner Benny R. Edwards filed a Petition for Rehearing and Rehearing *En Banc*. On April 14, 2005, the United States Court of Appeals for the Fourth Circuit denied the Petition for Rehearing and Rehearing *En Banc*.

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fourth Circuit by way of *certiorari* pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS

This case involves the interpretation of 33 U.S.C. § 928 (b), which states as follows:

(b) Attorney's fee; successful prosecution for additional compensation; independent medical evaluation of disability controversy; restriction of other assessments

If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely

upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. The foregoing sentence shall not apply if the controversy relates to degree or length of disability, and if the employer or carrier offers to submit the case for evaluation by physicians employed or selected by the Secretary, as authorized in section 907(e) of this title and offers to tender an amount of compensation based upon the degree or length of disability found by the independent medical report at such time as an evaluation of disability can be made. If the claimant is successful in review proceedings before the Board or court in any such case an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel in accord with the above provisions. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

STATEMENT OF THE CASE

Petitioner, Benny R. Edwards ("Edwards"), suffered an injury on February 22, 2002, while working as an employee of Virginia International Terminals, Inc. ("VIT"). Edwards filed a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901, *et seq.* (the "LHWCA"), on February 28, 2002 with

the Department of Labor. On March 28, 2002, VIT filed a form LS-207 in response, in which it denied that Edwards was entitled to benefits.

On July 23, 2002, counsel for Edwards wrote to the Department of Labor concerning Edwards' entitlement to benefits for the period from February 23, 2002 through February 25, 2002. In this letter, counsel for Edwards requested an informal conference for resolution of that issue. In a letter dated August 1, 2002, the District Director advised Edwards to provide medical documentation in support of his claim for benefits for the referenced period. At the same time, counsel for Edwards received a letter from VIT denying benefits for that period.

In a letter dated August 15, 2002, counsel for Edwards informed the District Director that Edwards' physician had advised Edwards to remain out of work when he was seen by the physician on February 23, 2002 and that he was therefore entitled to benefits. At the same time, counsel for Edwards submitted an LS-18 to the District Director requesting that he forward the LS-18 to the Administrative Law Judge if he did not feel that an informal conference was necessary. On August 22, 2002, the District Director forwarded the matter to the Administrative Law Judge. After the matter was in the

hands of the Administrative Law Judge, VIT adjusted Edwards' compensation to allow full payment from February 23, 2002 through February 25, 2002. The payment was made on August 27, 2002.

Counsel for Edwards then sought an attorney's fee to be paid by VIT for work performed by Edwards' counsel before the Administrative Law Judge in the amount of $117.00. VIT objected to the award of an attorney's fee against it, asserting that because no informal conference was held before the district director an attorney's fee could not be awarded pursuant to Section 28 (b) of the LHWCA, 33 U.S.C. Section 928 (b). The Administrative Law Judge agreed. Benny R. Edwards v. Virginia International Terminals, (ALJ No. 2002-LHC-2713) (December 2, 2002) (Appendix D).

Edwards sought review of the Administrative Law Judge's decision by the Benefits Review Board. The Benefits Review Board reversed the decision of the Administrative Law Judge, holding that VIT was liable for the attorney's fee to Edwards' counsel pursuant to Section 928 (a). Benny R. Edwards v. Virginia International Terminals, Unpublished (BRB No. 03-0244) (November 25, 2003) (Appendix C).

VIT petitioned the Fourth Circuit Court of Appeals for review of the decision of the Benefits Review Board. In a written opinion dated February 16, 2005, the Fourth Circuit reversed the decision of the Benefits Review Board, holding that counsel for Edwards was not entitled to an attorney's fee against VIT because an informal conference had not been held. Virginia International Terminals v. Benny R. Edwards, Virginia International Terminals, Inc. v. Benny R. Edwards; Director, Office of Workers' Compensation Programs, United States Department of Labor, No. 04-1338, 398 F.3d 313 (4th Cir. Feb. 16, 2005) (Appendix B).

Edwards sought *en banc* review of the panel's decision, which was denied by the Fourth Circuit on April 14, 2005. Virginia International Terminals, Inc. v. Benny R. Edwards; Director, Office of Workers' Compensation Programs, United States Department of Labor, No. 04-1338 (April 14, 2005) (Appendix A). Edwards now seeks review of the Fourth Circuit's decision that, pursuant to 33 U.S.C. Section 928 (b), a claimant is not entitled to an award of attorneys' fees against the employer whenever a district director fails to hold an informal conference

REASONS FOR GRANTING THE WRIT

The Fourth Circuit Court of Appeals has entered a decision in this case which conflicts with the decisions of other United States courts of appeals, the legislative history of the LHWCA, and a decision of the Fourth Circuit Court of Appeals on the issue of whether an informal conference is required before attorneys' fees may be awarded against an employer in favor of counsel for the claimant under the Longshore and Harbor Workers' Compensation Act.

In its February 16, 2005 opinion, the Fourth Circuit Court of Appeals interpreted 28 U.S.C. Section 928 (b) to require "*all* of the following: (1) an informal conference, (2) a written recommendation from the deputy or Board, (3) the employer's refusal to adopt the written recommendation, and (4) the employee's procuring of the services of a lawyer to achieve a greater award than what the employer was willing to pay after the written recommendation." *Id.* Applying these criteria, the Fourth Circuit held that attorneys' fees could not be awarded in Edwards' case in favor of claimant's counsel against the employer "because the district director never held an informal conference or issued a written recommendation on the supplemental claim. The failure to hold an informal

conference or issue a written recommendation is fatal to a claim for attorney's fees under the plain terms of section 928(b)." *Id* at 7.

The Fourth Circuit's opinion that informal conferences and written recommendations are required before attorneys' fees can be awarded against the employer conflicts with the decisions of the Ninth Circuit Court of Appeals, which based its decisions on the legislative history of the LHWCA, as well as another decision of the Fourth Circuit Court of Appeals. These conflicts, involving an important federal question, can only be resolved by this Court on *certiorari.*

I. The Fourth Circuit's opinion that an informal conference and a written recommendation are required before attorneys' fees may be awarded against the employer under the LHWCA is in conflict with decisions of the Ninth Circuit Court of Appeals, which has carefully considered the legislative history of the Act in coming to its decisions.

Congress made its intent clear when it amended Section 928 (b) in 1972, at which time it explained that the Act was being amended to

> authorize assessment of legal fees against employers in cases where the existence or

> extent of liability is controverted and the claimant succeeds in establishing liability or obtaining increased compensation in formal proceedings or appeals. Attorneys fees may only be awarded against the employer where the claimant succeeds, and the fees awarded are to be based on the amount by which the compensation payable is increased as a result of litigation. Attorneys fees may not be assessed against employers (or carriers) in other cases.
>
> In all cases the amount of attorneys fees payable to the claimant's lawyer (either by the employer or the claimant) is subject to approval by the deputy commissioner, hearing examiner, board or court, as the case may be.

1972 U.S.Code Cong. & Admin.News., pp. 4698, 4706, 4717. Nothing in the legislative history of Section 928 suggests that a district director's failure to hold an informal conference would prevent an employee from recovering attorneys' fees where the extent of liability is controverted and the claimant subsequently obtains an increase in compensation through the assistance of an attorney.

In Edwards' case, the extent of liability was controverted by the Employer and Edwards later succeeded in increasing his compensation through the assistance of an attorney. By hinging the award of attorneys' fees in the injured employee's favor on the holding of an informal conference and the issuance of a recommendation, the Fourth Circuit thwarted this manifest legislative intent.

While the Fourth Circuit failed to inquire as to the legislative history behind the 1972 amendment to Section 928 (b), the Ninth Circuit Court of Appeals did consider what Congress intended when that Court decided *National Steel & Shipbuilding Co. v. U. S. Dept. of Labor,* 606 F.2d 875 (9th Cir. 1979). In *National Steel,* that Court addressed specifically the issue of whether written recommendations are necessary before awards are made under the Act. The decision in *National Steel* is in direct conflict with the Fourth Circuit's decision. In *National Steel,* the Ninth Circuit reviewed the legislative history of Section 928 (b) and noted as follows:

> The purpose of [Section 928 (b)] is to authorize the assessment of legal fees against employers in cases where the existence or extent of liability is controverted and the employee-claimant

> succeeds in establishing liability or obtaining increased compensation in formal proceedings in which he or she is represented by counsel . . .

Based on this legislative history, the Court held:

> We do not believe that the statute contemplates the making of a written recommendation by the deputy commissioner as a precondition to the imposition of liability for attorney's fees. The congressional intent was to limit liability to cases in which the parties disputed the existence or extent of liability, whether or not the employer had actually rejected an administrative recommendation.

Id. at 882 (emphasis added).

While an informal conference was held in *National Steel,* that fact does not change its applicability here. In *Everitt v. Director, OWCP,* 107 Fed. Appx. 750, 2004 WL 1799368 (9th Cir. August 10, 2004), the Ninth Circuit addressed the argument that a failure to hold an informal conference prevented the recovery of attorneys' fees. Citing *National Steel,* the Ninth Circuit stated that "We reject SSA's contention that an informal conference and/or

written recommendation is required for an employee to recover attorney's fees under § 928(b)." *Everitt, n. 4.*

Thus, according to the Ninth Circuit, neither an informal conference nor the employer's rejection of an administrative recommendation is a pre-requisite to the collection of attorneys' fees.

Although *National Steel* is the seminal decision on this issue, the Fourth Circuit failed to address it in any fashion. Instead, it quoted from *Todd Shipyards Corp. v. Director, OWCP,* 950 F.2d 607 (9th Cir. 1991), wherein that Court stated that "[S]ection 928(b) does not authorize the payment of attorneys' fees for services performed by a claimant's attorney, unless the record shows that the employer or carrier refused to accept the written recommendation of the claims examiner following an informal conference."

The Fourth Circuit's reliance on *Todd Shipyards* as a basis to hold that informal conferences must be held before attorneys' fees may be awarded against the employer was simply misplaced. The issue in *Todd Shipyards* was not whether attorneys' fees can be awarded despite the district director's failure to hold an informal conference or issue a recommendation. In *Todd Shipyards,* the parties came to an agreement during the informal

conference, and there was nothing in dispute thereafter. The question was, therefore, whether attorneys' fees could be awarded when there was nothing in dispute *after* the informal conference. *Todd Shipyards,* therefore, is inapposite. Indeed, the Court in *Todd Shipyards* distinguished it from its earlier decision in *National Steel* on that very basis. This explains the Ninth Circuit's decision in *Everitt* wherein it relied on *National Steel*, and not *Todd Shipyards,* to resolve the precise question raised in the instant case. Thus, the Fourth Circuit erred in relying on *Todd Shipyards* for the proposition that an informal conference and recommendation is necessary before attorneys' fees can be awarded under the LHWCA.

II. The Fourth Circuit has rendered a decision which is in conflict with another decision by the Fourth Circuit on the issue of when attorneys' fees can be awarded under the LHWCA.

The Ninth Circuit's decision in *National Steel* is significant not only because it is a circuit decision which conflicts with the opinion of the Fourth Circuit. It is also significant because another panel of the Fourth Circuit cited it favorably and relied on it in a different case. In *Newport News Shipbuilding and Dry Dock v. Firth,* 134 F.3d 363,

1998 WL 29255 (4th Cir. January 28, 1998) (Unpublished), another panel of the Fourth Circuit stated as follows:

> Because [the employer] did not ignore any recommendation at the informal conference stage, the statute on its face appears inapplicable to support any fees based on these permanent partial disability benefits. *Nonetheless, notwithstanding the statute, written recommendations are not a necessary precondition to fee liability, because the congressional intent was to limit liability to cases in which the parties disputed the existence or extent of liability, whether or not the employer had actually rejected an administrative recommendation. See National Steel,* 606 F.2d at 882. (emphasis added).

Id. The *Firth* panel recognized that while Section 928 (b) *on its face* may appear to be inapplicable where a recommendation has not been made, *written recommendations are not a necessary precondition to fee liability because that was not Congress' intent.* The *Firth* panel relied on *National Steel* in making that decision. Accordingly, as it now stands in the Fourth Circuit, there

are conflicting decisions as to whether Section 928 (b) requires the holding of an informal conference and written recommendation. This Court should, therefore, grant Edwards' Petition and resolve the conflict.

It should also be noted that before and since the *National Steel* decision, the Benefits Review Board has held consistently that informal conferences are not a prerequisite to an award of attorneys' fees against employers under the Act. *Eason v. Newport News Shipbuilding,* BRB No. 03-0466 (April 2, 2004); *Caine v. Metropolitan,* 19 BRBS 180, 182 (1986); *Bednarek v. ITO of Baltimore,* 7 BRBS 708 (1978); *Director, OWCP v. Jacksonville Shipyards, Inc.,* 1 BRBS 26 (1974). As the Board stated in *Caine,* reference to the informal conference in Section 928 (b) must be regarded as "suggested guidelines rather than prerequisites." *Caine* at 182. This reasoning is consistent with *National Steel,* and the Fourth Circuit should have followed it in the instant case, as it did in *Firth.*

III. Whether Section 928 (b) of the LHWCA requires an informal conference before a claimant may be awarded attorneys' fees is an important question of federal law that has not been, but should be, settled by this Court.

The Fourth Circuit's decision inevitably will result in injustice to claimants seeking benefits under the LHWCA. Certainly, the amendment of Section 928 (b) was not intended to render the awarding of attorneys' fees dependent upon something so arbitrary as the customs of local directors. Ultimately, the result of the Fourth Circuit's decision is that competent counsel will be driven from the industry, causing serious harm to claimants under the LHWCA. This is a critical federal question with wide-ranging deleterious consequences which requires this Court's intervention and resolution.

That the Fourth Circuit failed to consider the legislative history and, as such, the enormity of the decision it was making, is made evident in the following excerpt from its opinion:

> Edwards protests that, despite the word "shall" in section 928(b), the decision to hold an informal conference actually lies within the discretion of the District Director.

> *See* 20 C.F.R. § 702.311. But the fact that the District Director has power to determine whether the conditions of section 928(b) are satisfied does not nullify those mandatory statutory conditions. *See Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1138 (4th Cir. 1995) ("[F]aithful to our promise, we will interpret the [LHWCA] as it is written, and as we have been instructed by the Supreme Court to do with respect to this very Act."). Plainly, under section 928(b), a fee award is not available absent an informal conference and written recommendation. None occurred here, and so Edwards was not entitled to a fee award under this subsection.

(Opinion at 8). Edwards argued that the decision *whether to hold an informal conference* is discretionary pursuant to Section 702.311 and that disallowing attorneys' fees on the basis that an informal conference had not been held would render attorneys' fees recoverable at the whim of the district director. The discretion to which Edwards refers is not the "power to determine whether the conditions of section 928(b) are satisfied" as the Fourth Circuit

suggested, but the power to decide whether to hold an informal conference. There is no question that some district directors, like the one in the instant case, rarely hold informal conferences. Others, both in this Circuit and in other Circuits, always hold them. It is clear that under Section 702.311, district directors are within their discretion in not holding informal conferences. Under the panel's decision, however, those claimants unfortunate enough to have their cases assigned to a district director who does not hold informal conferences will be unable to recover attorneys' fees against the employer simply because the district director has exercised his discretion not to conduct such conferences. The result is that fee awards are not governed by statute *but by the impulses of district directors.* This is an arbitrary basis for determining awards, and it cannot be what Congress intended when it amended the Act in 1972. Thus, this Court should grant Edwards' Petition and resolve this important question of federal law.

CONCLUSION

This case presents critical issues concerning the question of awarding attorneys fees against employers under the LHWCA which require resolution by this Court. The Court of Appeals for the Fourth Circuit has created a rule that has the potential to place an unprecedented amount of power in the hands of government officials in determining when a claimant may have his attorney's fees awarded against the employer. Because a completely different rule exists in the Ninth Circuit, the Fourth Circuit's decision creates disparate treatment of similarly-situated maritime workers, which is the very result Congress intended to prevent when amending the Act in 1972. For these reasons, the Petitioner respectfully requests that this Court take the opportunity presented in this case to resolve the existing conflict.

Respectfully submitted,

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APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED APRIL 14, 2005

NO. 04-1338

03-0244-BRB

VIRGINIA INTERNATIONAL TERMINALS, INC.

Petitioner

v.

BENNY R. EDWARDS; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondents

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Luttig, Judge Motz, and Judge Duncan.

For the Court,

/s/ Patricia S. Connor

CLERK

APPENDIX B

APPENDIX B

United States Court of Appeals,

Fourth Circuit.

VIRGINIA INTERNATIONAL TERMINALS, INC.,

Petitioner,

v.

Benny R. EDWARDS; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Respondents.

No. 04-1338.

Feb. 16, 2005.

Argued: Dec. 2, 2004.

Decided: Feb. 16, 2005.

On Petition for Review of an Order of the Benefits Review Board. (03-0244-BRB)

ARGUED: F. Nash Bilisoly, IV, VANDEVENTER BLACK, L.L.P., Norfolk, Virginia, for Petitioner. Gregory Edward Camden, MONTAGNA, KLEIN, CAMDEN, L.L.P., Norfolk, Virginia, for Respondents.

Before LUTTIG, MOTZ, and DUNCAN, Circuit Judges.

Reversed by published opinion. Judge Luttig wrote the opinion, in which Judge Motz and Judge Duncan joined.

OPINION

LUTTIG, Circuit Judge:

*1 Petitioner Virginia International Terminals ("VIT") petitions for review of an order of the Benefits Review Board of the United States Department of Labor, which granted attorney's fees to respondent Benny R. Edwards on a supplemental claim for compensation under the Longshore and Harbor Worker's Compensation Act (LHWCA). Because we hold that Edwards is not entitled to an award of attorney's fees under the LHWCA, we reverse the judgment of the Benefits Review Board.

I.

Edwards was injured on February 22, 2002, while working as an employee of VIT. He filed an LS-203 "Claim for Compensation" form with the Office of Workers' Compensation Programs ("OWCP") on February 28, 2002, seeking disability compensation under the LHWCA. J.A. 7.

In response to this filing, VIT voluntarily paid Edwards temporary total disability benefits for a period beginning on February 26, 2002, and filed a "Payment of Compensation Without Award" form with the OWCP, dated March 18. J.A. 8. VIT terminated those disability payments as of March 31, 2002, because a doctor had cleared Edwards to resume work on April 1. J.A. 9. Thus, within eighteen days of the initial filing of Edwards' claim related to the February 22 injury, VIT voluntarily paid him disability benefits for the period from February 26 through March 31.

Several months later, on July 29, 2002, Edwards' counsel sent a brief letter to the Program Director at OWCP, requesting disability benefits relating to the same February 22 injury for the period from February 23 through February 25 and requesting "a conference on the issue of temporary total disability benefits" for that period. J.A. 10. On August 1, the district director replied with a letter to Edwards' counsel, requesting medical evidence to support his demand for additional benefits and noting that VIT's representative claimed that "there was no support of loss time [sic] until February 26th." J.A. 38. Edwards' counsel replied on August 26, declining to provide medical support and requesting formal adjudication before an ALJ. J.A. 50-51. On August-

27, rather than undergoing formal adjudication, VIT paid benefits for the three contested days. J.A. 13. At no point did the district director hold an informal conference or issue a written recommendation on the issue of the three days' supplemental benefits claimed by Edwards.

Subsequently, Edwards' counsel filed a petition for $117.00 of attorney's fees for work in connection with the request for the three days' supplemental benefits. J.A. 15-16. VIT objected to the fee petition, and the ALJ denied the petition on the grounds that fees were not authorized by 33 U.S.C. § 928(b). J.A. 17. On appeal, the Benefits Review Board reversed the ALJ's decision and held that attorney's fees were due pursuant to 33 U.S.C. § 928(a). J.A. 68- 71. VIT now petitions for review of the Board's order, arguing that neither section 928(a) nor section 928(b) authorizes a fee award in this case.

II.

*2 We review the Benefits Review Board's interpretation of the LHWCA de novo, because the Board is not a policy-making agency and its statutory interpretation is thus not entitled to any special deference from the court. *Potomac Electric Power Co. v. Director, Office of Worker's*

Compensation Programs, 449 U.S. 268, 279 n. 18, 101 S.Ct. 509, 66 L.Ed.2d 446 (1980); *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.,* 135 F.3d 915, 918 (4th Cir.1998).

Section 928 of the LHWCA provides for attorney's fees in two relevant sets of circumstances. First, section 928(a) provides for a fee award in cases where the employer refuses to pay any compensation after the filing of a claim and the claimant subsequently successfully prosecutes the claim with the assistance of an attorney:

> If the employer or carrier declines to pay any compensation on or before the thirtieth day *after receiving written notice of a claim for compensation having been filed from the deputy commissioner,* on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded ... a reasonable attorney's fee against the employer or carrier....

33 U.S.C. § 928(a) (emphasis added). Second, section 928(b) provides for a fee award in cases where the employer initially pays voluntary compensation and a subsequent

dispute arises about total amount of compensation due--but only in highly specified circumstances:

> If the employer or carrier pays or tenders payment of compensation without an award ... and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, *the deputy commissioner or Board shall set the matter for an informal conference* and following such conference the deputy commissioner or Board *shall recommend in writing a disposition of the controversy.* If the employer or carrier refuse to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. *If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee ... shall be awarded* in addition to the amount of compensation.... *In all other cases any claim for legal services shall not be assessed against the employer or carrier.*

33 U.S.C. § 928(b) (emphases added). VIT argues that

neither of these provisions entitles Edwards to a fee award. We agree.

A.

First, contrary to the Board's interpretation, Edwards is not entitled to attorney's fees under the plain language of section 928(a). That section authorizes a fee award only if "the employer ... declines to pay *any* compensation on or before the thirtieth day after having received written notice of a claim for compensation having been filed from the deputy commissioner...." 33 U.S.C. § 928(a) (emphasis added). VIT contends that this section is inapplicable because VIT voluntarily paid Edwards compensation for the February 22 injury by March 18, within thirty days of the February 28 filing of his LS-203 form. In contrast, Edwards argues that the submission of his informal July 29 letter to the Program Director constituted a separate "claim for compensation having been filed" within the meaning of section 928(a), and that VIT's initial refusal to pay the additional three days' benefits on that *supplemental* claim constituted "declin[ing] to pay any compensation" on that "claim." 33 U.S.C. § 928(a).

We reject Edwards' argument for two reasons. First, the most

natural reading of the phrase "filing a claim" refers to a formal action that initiates a legal proceeding, rather than an informal action that seeks to alter or amend a pre-existing settlement on a prior claim. *See, e.g., Webster's Third New International Dictionary* 849 (1986) (defining "file" as "to place (as a paper or instrument) on file among the legal or official records esp. by *formally* receiving, endorsing, and entering" and "to perform the *first* act of (as a lawsuit): *commence* " (emphases added)); *Black's Law Dictionary* 642 (7th ed.1999) (defining "file" as "[t]o deliver a legal document to the court clerk or record custodian for placement into the official record" and "to commence a lawsuit"). Moreover, the context in which the phrase is used, namely a statutory provision that carefully details the procedural conditions for a fee award, confirms that this narrow and unambiguous meaning of the phrase is correct, rather than the broad, vague meaning of "filing a claim" that Edwards would ascribe. *See Brown v. Gardner,* 513 U.S. 115, 118, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994) ("The meaning of statutory language ... depends on context."). Thus Edwards' submission of an informal letter, referring back to a claim previously "filed" via the requisite LS-203 form and requesting a modification of the benefits received for the same injury, did not constitute a "claim for compensation

having been filed" under section 928(a).

*3 Second, under a longstanding canon of interpretation, adjacent statutory subsections that refer to the same subject matter--here, attorneys' fee awards under the LHWCA--must be read *in pari materia* as if they were a single statute. *See United States v. Srnsky,* 271 F.3d 595, 602 (4th Cir.2001) (holding that the language in adjacent statutory subsections must be read *in pari materia*). This canon applies

squarely to the adjacent subsections 928(a) and 928(b) of title 33. But, as quoted above and discussed below, section 928(b) exhaustively specifies conditions for fee awards in circumstances where, as here, the employer initially pays compensation voluntarily after the filing of a claim, but then refuses a supplemental request for benefits on the same claim. *See* 33 U.S.C. § 928(b) ("If the employer or carrier pays or tenders payment without an award ... and thereafter a controversy develops over the amount of *additional compensation,* if any, to which the employee may be entitled ...." (emphasis added)). Congress' specification in section 928(b) of detailed conditions for fee awards in disputes about *supplemental* benefits on voluntarily paid claims would have no effect whatsoever if, as Edwards urges, the applicant's

submission of a letter that created a "controversy ... over the amount of additional compensation" under section 928(b) also constituted "a claim for compensation having been filed" under section 928(a). Every dispute about supplemental benefits would be governed by the less stringent conditions of section 928(a), and the more stringent conditions of section 928(b) would be rendered superfluous. Therefore, reading section 928(a) as *in pari materia* with section 928(b), it is evident that Edwards' letter of July 29 did not constitute "a claim for compensation having been filed," and section 928(a) authorizes no fee award for him.

In holding to the contrary, the Board relied principally on *Pool Co. v. Cooper,* 274 F.3d 173 (5th Cir.2001), which held an employer liable for attorney's fees under section 928(a), despite the fact that the employer had voluntarily paid benefits prior to the filing of any claim--and then refused to pay once a formal claim was filed. *Id.* at 186-87. But *Pool Co.* is inapposite because, in that case, the employer's voluntary payment was *prior to* any formal filing by the applicant: the employee was injured, the employer voluntarily paid benefits, and *then* the employee filed a formal claim, *after* which the employer declined any further compensation. *See id.* Therefore, in *Pool Co.* the conditions

of section 928(a) were unambiguously fulfilled. *See* 33 U.S.C. § 928(a) ("If the employer or carrier declines to pay any compensation ... *after* receiving written notice of a claim for compensation having been filed ...." (emphasis added)); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, (9th Cir.2003) ("Fees under subsection (a) are available even though the Company voluntarily paid compensation *before* receiving notice of the claim. The relevant time period we look to for determining whether the employer 'declined to pay any compensation' *begins with receiving notice of the claim*, and ends thirty days after." (emphases added)). In contrast, here VIT voluntarily paid benefits within thirty days *after* Edwards' formal claim, thereby rendering section 928(a) inapplicable. We thus conclude that Edwards was not entitled to a fee award under section 928(a).

B.

*4 Likewise, as the ALJ initially held, Edwards is not entitled to a fee award under section 928(b). Where "the employer or carrier pays or tenders payment of compensation without an award ... and thereafter a controversy develops over the amount of additional compensation," section 928(b) requires *all* of the following: (1) an informal conference, (2) a written recommendation from the deputy or Board, (3) the

employer's refusal to adopt the written recommendation, and (4) the employee's procuring of the services of a lawyer to achieve a greater award than what the employer was willing to pay after the written recommendation. *Id.* None of these four conditions is fulfilled in Edwards' case, because the district director never held an informal conference or issued a written recommendation on the supplemental claim. [FN*] The failure to hold an informal conference or issue a written recommendation is fatal to a claim for attorney's fees under the plain terms of section 928(b). *See Pool Co.*, 274 F.3d at 186 ("[N]o informal conference with the Department of Labor ever took place.... [T]hat fact poses an absolute bar to an award of attorney's fees under § 28(b)."); *Todd Shipyards Corp. v. Director, Office of Workers' Compensation Programs,* 950 F.2d 607, 608 (9th Cir.1991) ("Section 928(b) does not authorize the payment of attorneys' fees for services performed by a claimant's attorney, unless the record shows that the employer or carrier refused to accept the written recommendation of the claims examiner following an informal conference.").

Edwards protests that, despite the word "shall" in section 928(b), the decision to hold an informal conference actually lies within the discretion of the District Director. *See* 20

C.F.R. § 702.311. But the fact that the District Director has power to determine whether the conditions of section 928(b) are satisfied does not nullify those mandatory statutory conditions. *See Sidwell v. Express Container Servs., Inc.,* 71 F.3d 1134, 1138 (4th Cir.1995) ("[F]aithful to our promise, we will interpret the [LHWCA] as it is written, and as we have been instructed by the Supreme Court to do with respect to this very Act."). Plainly, under section 928(b), a fee award is not available absent an informal conference and written recommendation. None occurred here, and so Edwards was not entitled to a fee award under this subsection.

CONCLUSION

*5 Because neither section 928(a) nor section 928(b) authorizes a fee award in this case, the judgment of the Benefits Review Board is reversed and the case is remanded with instructions that judgment be entered in favor of petitioner VIT.

REVERSED

FN*At oral argument, Edwards' counsel suggested that the Director's individual communications with the parties by telephone and the letter of August 1,

taken collectively, could be treated as an "informal conference," and that the August 1 letter could be treated as a "written recommendation." But even if it were plausible to treat the phone calls and letter as a *de facto* "informal conference," it is obvious that the letter, which merely demanded medical evidence to *support* the supplemental claim, did not constitute a "written recommendation" for the *disposition* of that claim under section 928(b). *See* J.A. 38 ("If you want the 23rd to the 25th of February paid, then provide medical to support the claim. [VIT's agent] says that there was no support of loss time until February 26th and she paid that.").

2005 WL 357361 (4th Cir.)

APPENDIX C

APPENDIX C

U.S. Department of Labor
Benefits Review Board
P.O. Box 37601
Washington, D.C. 20013-7601

BRB No. 03-0244

BENNY R. EDWARDS
Claimant-Petitioner
v.

VIRGINIA INTERNATIONAL TERMINALS
and
SIGNAL ADMINISTRATION c/o
ABERCROMBIE, SIMMONS
& GILLETE OF VIRGINIA
Employer/Carrier

Respondents.

DATE ISSUED: Jan. 30, 2004

ORDER ON MOTION FOR RECONSIDERATION

Employer has filed a timely motion for reconsideration of the Board's Decision and Order in the captioned case, *Edwards v. Virginia Int'l Terminals*, BRB No. 03-0244 (Nov. 25, 2003). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant has not responded to this motion, but has filed a petition for an attorney's fee for services performed before the Board in connection with this appeal.

In his decision, the administrative law judge denied claimant an employer-paid attorney's fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), because an informal conference was not held and the district director did not issue a recommendation with which employer refused to comply. Claimant appealed, contending that the district director, in essence, refused to convene an informal conference, and that the case relied upon by the administrative law judge, *Staftex Staffing v. Director, OWCP [Loredo]*, 237 F.3d 409, 34 BRBS 105(CRT), 35 BRBS 26(CRT) (5th Cir. 2000), is not controlling precedent in this Fourth Circuit case.

The Board stated that it need not reach the parties' contentions concerning Section 28(b) as fee liability could be assessed against employer pursuant to Section 28(a) of the

Act, 33 U.S.C. §928(a). In this case, employer voluntarily paid benefits after claimant's injury and ceased benefits upon claimant's ability to return to work. Claimant thereafter filed a claim for additional benefits which employer declined to pay. The case was referred the administrative law judge and employer then agreed to pay claimant the benefits in dispute. Pursuant to *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001), the Board held that, as claimant successfully prosecuted his claim, employer is liable for claimant's attorney's fee under Section 28(a). *See also Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003). The Board remanded the case for the administrative law judge to determine the amount of the fee due claimant's counsel.

In its motion for reconsideration, employer contends that since counsel sought a fee of only $117 for work performed before the administrative law judge and as employer did not object to the amount of the fee, the Board need not remand the case and may enter a fee award for $117. We grant the motion for reconsideration and vacate that portion of the Board's decision remanding the case to the administrative law judge. Claimant's counsel is awarded a

fee of $117 for work performed before the administrative law judge.

Claimant counsel seeks an attorney's fee of $1,581.00, representing 6 hours at an hourly rate of $160 and 2.76 hours at an hourly rate of $225. Employer has not objected to counsel's requested fee. We award counsel the fee as requested as it is reasonably commensurate with the necessary work performed in this appeal. 20 C.F.R. §802.203.

Accordingly, employer's motion for reconsideration is granted. 20 C.F.R. §802.409. That portion of the Board's decision remanding the case to the administrative law judge is vacated, and claimant's counsel is awarded a fee of $117 for work performed before the administrative law judge. Claimant's counsel is awarded a fee of $1,581.00 for work performed before the Board, to be paid directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

APPENDIX D

APPENDIX D

U.S. Department of Labor
Benefits Review Board
P.O. Box 37601
Washington, D.C. 20013-7601

BRB No. 03-0244

BENNY R. EDWARDS
Claimant-Petitioner
v.

VIRGINIA INTERNATIONAL TERMINALS
and
SIGNAL ADMINISTRATION c/o
ABERCROMBIE, SIMMONS
& GILLETE OF VIRGINIA
Employer/Carrier

Respondents.

DATE ISSUED: Nov. 25, 2003

Appeal of the Supplemental Decision and Order Denying Attorney's Fees of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Breit Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

F. Nash Bilisoly (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

DECISION AND ORDER

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Denying Attorney's Fees(2002-LHC-2713) of Administrative Law Judge Richard E. Huddleston rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary, and will not be set aside unless the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was injured on February 22, 2002. Employer paid benefits without an award commencing February 26, 2002. Employer terminated benefits on April 16, 2002, when claimant was released to return to full duty work. On July 23, 2002, claimant's counsel wrote to the Office of Workers' Compensation Programs requesting benefits for the period from February 23 to 25, 2002, as well as reimbursement of certain medical expenses. Counsel requested that the district director schedule an informal conference. On August 1, 2002, the district director wrote to claimant's counsel, requesting that he "provide medical to support the claim" in that employer's position is that claimant did not lose time until February 26. The district director also informed claimant that employer would pay the medical bills. Also by letter dated August 1, 2002, employer advised claimant's counsel that there was no medical support for disability benefits until February 26, when claimant was placed on restricted duty.

Claimant responded by letters to the district director dated August 15 and August 26, 2002, reiterating his position that claimant was disabled on February 23; stating that he did not feel a conference was appropriate given the tenor of employer's letter; stating that the district director should

forward the claim to the Office of Administrative Law Judges (OALJ) if the district director did not feel a conference was appropriate; stating that, currently, he did not have medicals to back up his claim, and that he may have to depose the doctor; and stating that claimant would testify as to his disability but that counsel realized this would "not carry the day" at the district director level. Claimant attached a Form LS-18 pre-hearing statement to his August 15 letter. On August 22, 2002, the district director forwarded the case to the OALJ. On August 27, 2002, employer paid claimant benefits for the three days in question. On October 7, 2002, the administrative law judge remanded the case to the district director, pursuant to 20 C.F.R. §702.351 which applies when the controversion of the claim is withdrawn.

Claimant's counsel subsequently sought an attorney's fee for work performed before the administrative law judge, in the amount of $117. Employer objected to its liability for a fee pursuant to Section 28(b), 33 U.S.C. §928(b), on the ground that there was no informal conference before the district director. The administrative law judge found that because no informal conference was held, and more importantly, because the district director never made a recommendation with which employer refused to comply, employer cannot be held

liable for claimant's attorney's fee under Section 28(b) notwithstanding that employer did not pay benefits until after the case was transferred to the OALJ.

On appeal, claimant contends that since it is within the discretion of the district director to call an informal conference, the lack of such a conference cannot be relied on by employer to avoid paying an attorney's fee. Claimant contends that it is the practice of this district director to review the file and then to determine if an informal conference would be worthwhile. In this case, claimant contends that the district director communicated with both parties and then forwarded the claim to the OALJ. Finally, claimant contends that since this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the Fifth Circuit's decision in *Staftex Staffing v. Director, OWCP*, 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000), on which the administrative law judge relied, is not controlling precedent. Employer responds in support of the administrative law judge's decision. We do not reach the parties' specific contentions regarding Section 28(b) as the case may be resolved by application of Section 28(a).

We reverse the administrative law judge's denial of an attorney's fee payable by employer and hold that under the facts of this case employer is liable for claimant's attorney's fee pursuant to Section 28(a) of the Act, 33 U.S.C. §928(a). Section 28(a) states:

> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier. . . .

33 U.S.C. §928(a). In *Pool Co. v. Cooper,* 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001), the Fifth Circuit denied claimant an employer-paid attorney's fee pursuant to Section 28(b) due to the lack of informal conference before the

district director. The court, however, held employer liable for claimant's attorney's fee pursuant to Section 28(a), on facts similar to those in this case. In *Pool Co.*, the employer voluntarily paid claimant benefits, before claimant filed any claim. Employer stopped making payments, and claimant thereafter filed a claim for additional benefits. Employer controverted the claim within 30 days of receiving written notice of it. The case went before an administrative law judge and claimant obtained an award of additional benefits. In holding employer liable for claimant's attorney's fee under the plain language of Section 28(a), the Fifth Circuit stated, "we find no basis in any statute, regulation, or case law for the BRB's holding that [employer's] prior voluntary payment of benefits precluded liability under § 28(a). Such payments preceded [employer's] receipt of written notice of [claimant's] claim, and are thus irrelevant to the question of an award under § 28(a)." *Id.*, 274 F.3d at 186-187, 35 BRBS at 119(CRT). The Ninth Circuit recently agreed with this interpretation of Section 28(a). *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 37 BRBS 80(CRT) (9th Cir. 2003) (but holding that employer is not liable for a fee because claimant did not successfully prosecute his claim).

In this case, employer voluntarily paid benefits after claimant's injury, and ceased payments upon claimant's ability to return to work. Thereafter, claimant filed a claim on July 23, 2002, which employer "declined to pay" by letter dated August 1, 2002, prior to the expiration of 30 days. After the case was referred to the OALJ, employer agreed to pay additional benefits. Thus, claimant successfully prosecuted his claim before the administrative law judge.

Pursuant to the reasoning in *Pool Co.*, we hold that employer is liable for claimant's attorney's fee pursuant to Section 28(a). We reverse the administrative law judge's finding that employer is not liable for claimant's attorney's fee and we remand the case to the administrative law judge to determine the amount of the fee due claimant's counsel. 20 C.F.R. §702.132.

Accordingly, the administrative law judge's Supplemental Decision and Order Denying Attorney's Fees is reversed. The case is remanded for consideration of counsel's fee petition.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

APPENDIX E

APPENDIX E

U. S. Department of Labor
Office of Administrative Law Judges
603 Pilot House Drive – Suite 300
Newport News, VA 13606-1904
(757) 873-3099
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Issue Date: 22 November 2002
Case No. 2002-LHC-2713
OWCP No. 5-113383

In the Matter of
BENNY R. EDWARDS,
Claimant

v.

VIRGINIA INTERNATIONAL TERMINALS,
Employer
SIGNAL ADMINISTRATION
C/O ABERCROMBIE, SIMMONS & GILLETTE OF VIRGINIA,
Carrier

SUPPLEMENTAL DECISION AND ORDER DENYING ATTORNEY'S FEES

On October 7, 2002, an Order Remanding Claim was issued in the above case. The remand order was issued in response to a letter dated September 23, 2002, from Copunsel for the Claimant which stated: "Following transmittal of this case, the employer has begun making appropriate payments to my client and therefore, the claimant respectfully requests that you remand the case back to the OWCP." This correspondence was held to constitute a statement that the parties are withdrawing controversion of the issues set for formal hearing pursuant to 20 C.F.R. Section 702.351, which provides in such cases that proceedings shall be halted and the matter remanded to the District Director, OWCP, disposition pursuant to 20 C.F.R. Section 702.315.

On October 4, 2002, Counsel for the Claimant, Gregory E. Camden, filed an application for approval of attorney's fee in the amount of $117.00. The fee petition lists services commending on August 26, 2002, and anding on September 23, 2002. Objections were filed by the Employer on November 5, 2002. A response to the objections was filed on November 13, 2002.

Employer has objected to the payment of any attorney's fees on the grounds it is not liable for attorney's

fees under Section 28(b) of the Act, unless an informal conference was conducted, thereby giving Employer an opportunity to follow and OWCP recommendation and accept it within 30 days, citing *Todd Shipyards v. Director, OWCP,* 950 F.2d 607 (9th Cir. 1991); *Staftex Staffing v. Director, OWCP,* 217 F.3d 365 (5th Cir. July 18, 2000); re-issued at 237 F.3d 409 (5th Cir. July 25, 2000)(then subsequently re-issued again on March 26, 2001 using the 237 F.3d 409 cite.)

Claimant has responded by identifying the sequence of events that led to the transmittal of this matter for formal hearing. However, that sequence of events clearly indicates that an informal conference was never held. More importantly, there is no indication that the District Director ever made a recommendation regarding payment of compensation. Therefore, there is no indication that the Employer ever refused to follow such a recommendation. While there appears to be no dispute that the Employer agreed to pay the compensation sought by the Claimant, only after the file was forwarded to the Office of Administrative Law Judges, that alone is not sufficient to compel the Employer's liability to pay attorney's fees under Section 28(b).

The statute in Section 28(b) provides that when a further controversy arises after voluntary payment of compensation, the district director *shall* conduct an informal conference and make a written recommendation regarding the disposition of the controversy. Due to the mandatory language of Section 28(b), the Employer's liability for attorneys' fees only arises if it has been given the opportunity to follow the Director's recommendation. Unfortunately, the Director did not conduct a conference but simply forwarded the file for hearing.

However, in the absence of any evidence or indication that the Employer refused to follow the Director's recommendation, Employer cannot be held liable for attorney's fees under Section 28(b).

Accordingly, it is ORDERED that the request for the Employer to pay attorney's fees to Gregory E. Camden, Esq., must be denied.

RICHARD E. HUDDLESTON
Administrative Law Judge

(3)

No. 05-61

Supreme Court, U.S.
FILED
AUG 10 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

BENNY R. EDWARDS,

Petitioner,

v.

VIRGINIA INTERNATIONAL TERMINALS, INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT VIRGINIA INTERNATIONAL TERMINALS, INC.

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COUNTER QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit was correct in concluding that, based on the plain language of § 928(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq*, 928(b), at least an Informal Conference and a written recommendation from the District Director of the Office of Workers' Compensation Programs are required before an employer can be required to pay a claimant's attorney's fees.

CORPORATE DISCLOSURE STATEMENT

Respondent Virginia International Terminals, Inc. is a nongovernmental corporation. There are no parent corporations for the Respondent, and no publicly held company owns 10 percent or more of the stock of the Respondent. Sup. Ct. R. 29.6.

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STATEMENT OF THE CASE

This matter arises from a claim for temporary total disability compensation filed by the Petitioner, Benny R. Edwards (hereinafter "claimant"), under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq., as amended* (hereinafter the "Act"). The parties agreed to certain periods of compensation for the claimant, and the only remaining issue to be decided by the Office of Administrative Law Judges, (hereinafter "OALJ") concerned an award of attorney's fees to claimant's counsel.

Because there was no Informal Conference nor recommendation in the case, the Administrative Law Judge originally held that Claimant's attorney was not entitled to fees. The ALJ held that "due to the mandatory language of § 28(b), the [employer's] liability for attorney's fees only arises if it has been given the opportunity to follow the Director's recommendation." *Edwards v. Virginia International Terminals*, ALJ No. 2002-LHC-2713) (December 2, 2002). Claimant's counsel filed a Petition for Review to the Benefits Review Board (hereinafter "BRB" or "Board"). The Board reversed the decision of the ALJ and awarded claimant's counsel a fee based on the application of another section, 928(a). *Edwards v. Virginia International Terminals*, BRB No. 03-0244 (November 25, 2003) (unpublished).

VIT timely filed its appeal to the Fourth Circuit Court of Appeals. The issues before the court were whether claimant's counsel was entitled to a fee award pursuant to either § 928(a) or § 928(b) of the Act. After

finding that § 928(a) was factually inapplicable, the panel held that the "failure to hold an informal conference or issue a written recommendation is fatal to a claim for attorney's fees under the plain terms of section § 928(b)," and ordered judgment entered for the employer. *Edwards*, 398 F.3d at 319 (citations omitted).

STATEMENT OF THE FACTS

A complete statement of the facts can be found in the Fourth Circuit's opinion in this matter. *See Edwards*, 398 F.3d 313. However, for the convenience of the Court, following is a brief recitation of the relevant facts.

Claimant was injured on February 22, 2002 and filed a claim seeking workers' compensation benefits pursuant to the Act. In response, VIT voluntarily paid temporary total benefits to the Claimant. Disability payments were terminated as of March 31, 2002 based on a full duty release, as Claimant was medically cleared to return to work.

Several months later, on July 29, 2002, Claimant's counsel wrote to the Office of Workers' Compensation Programs (hereinafter "OWCP") seeking additional benefits pursuant to his client's claim. The District Director responded, requesting Claimant's counsel to provide medical documentation to support the claim. Claimant's counsel declined to provide medical documents and instead sought transmittal of the case to the OALJ for formal adjudication. Not wishing to incur the expense of litigation over three days of temporary total disability,

despite there being no medical evidence to support the claim, VIT agreed to make the additional payment. No Informal Conference was held nor recommendation issued.

Shortly thereafter, Claimant's counsel filed attorney's fee petitions with both the OWCP and the OALJ. VIT filed objections to the fee petitions on several grounds, most significantly noting that Claimant's counsel was not entitled to fees pursuant to § 928(b), as there had not been an Informal Conference or recommendation.

By Order dated November 22, 2002, the ALJ issued a Decision denying Claimant's counsel's attorney fees. Claimant, by counsel, appealed to the BRB, which reversed the ALJ's decision, and held that attorney fees were due pursuant to § 928(a), which apply when no compensation has ever been paid.

VIT timely noted its appeal to the Fourth Circuit. On appeal, the court of appeals held that Claimant's counsel was not entitled to an award of attorney's fees under any provision of the Act. Relevant to the present petition, the Fourth Circuit held that an award of attorney's fees pursuant to § 928(b) of the Act "requires *all* of the following: (1) an informal conference; (2) a written recommendation from the [district director]; (3) the employer' refusal to adopt the written recommendation; and (4) the employee's procuring of the services of a lawyer to achieve a greater award than what the employer was willing to pay after the written recommendation." *Edwards*, 398 F.3d at 320 (emphasis in original).

After the Fourth Circuit denied Claimant's motion for rehearing or rehearing *en banc*, Claimant's counsel filed its Petition for Writ of Certiorari to this Court. This timely Brief in Opposition follows.

REASONS FOR DENYING THE PETITION

This Court should leave undisturbed by denying certiorari, the decision below of the Fourth Circuit Court of Appeals. This Court has stated that it will not grant a writ of certiorari except in cases where there is a true conflict of opinion and authority between the circuit courts of appeal, and in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 67 L. Ed. 712, 43 S. Ct. 614 (1955). *See also* Sup. Ct. Rule 10 (reasons to grant certiorari are limited to cases involving a conflict among the circuits, a conflict with the decisions of this Court, or an important question of law). As no applicable circumstances are present in the instant case, Petitioner's writ of certiorari should be denied.

I. THERE IS NO TRUE CONFLICT OF OPINION AND AUTHORITY BETWEEN THE CIRCUIT COURTS OF APPEAL ON THE ISSUE PRESENTED IN THIS CASE.

There is no true conflict between the Circuit Courts of Appeal on the issue of whether § 928(b) provides statutory prerequisites to an award of attorney's fees in certain cases as defined in the statute. In fact, the Fourth Circuit's decision in *Edwards* is

completely consistent with the Fifth Circuit's opinions on this issue and any perceived distinction between the Ninth Circuit's case law is readily dismissed upon a cursory inspection of the facts and rationale of the respective cases and the jurisprudence within the Ninth Circuit.

First, VIT notes that the *Edwards* decision is supported by, and in complete accord with the Fifth Circuit's decision in *FMC Corp. v. Perez*, 128 F.3d 908 (5th Cir. 1997), where the Fifth Circuit specifically held that claimant's counsel was not entitled to an attorney's fee from the employer if no Informal Conference was held. *Perez*, 128 F.3d at 909 ("an award of attorney's fees under § 928(b) is appropriate only if the dispute has been the subject of an informal conference with the Department of Labor."). The *Perez* decision has been cited regularly for this proposition by the Fifth Circuit since its publication. *See, e.g., Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 434 (5th Cir. 2000) ("An award of attorney's fees under § 928(b) 'is appropriate only if the dispute has been subject of an Informal Conference with the Department of Labor'."); *Pool Company v. Cooper*, 274 F.3d 173, 186 (5th Cir. 2001) (stating that no Informal Conference ever took place, and "that fact poses an absolute bar to an award of attorney's fees under § 928(b)"). In fact, the Fourth Circuit cited to, and relied upon, the *Pool Company* decision in its analysis. *Edwards*, 398 F.3d at 405.

The Fifth Circuit addressed this issue again in the case of *Staftex Staffing v. Director, Office of Workers' Compensation Programs*, 237 F.3d 404 (5th Cir. 2000), *modified on reh'g*, 237 F.3d 409 (5th Cir. 2000), where it

again held that an attorney may not recover fees even for successful issues unless the specific items are first submitted at an Informal Conference and the employer is given a chance to comply with the request and recommendation.[1]

Accordingly, the Fourth Circuit's decision in *Edwards* is completely consistent with the decisions of the Fifth Circuit on this issue.

Nevertheless, Claimant argues that the Fourth Circuit's decision directly conflicts with a decision of the Ninth Circuit, citing *National Steel & Shipbuilding Co. v. U.S. Dept. of Labor*, 606 F.2d 875 (9th Cir. 1979). This contention is inaccurate, for several reasons. First, the Ninth Circuit's Decision in *National Steel* is factually distinguishable from the Fourth Circuit's decision in this case, thus there is no valid circuit split as to the rule of law. Furthermore, the Ninth Circuit has again addressed this issue since its decision in *National Steel* and based on a different set of circumstances, came to a contrary conclusion, which is in fact consistent with the Fourth and Fifth Circuits.

First, *National Steel* is sufficiently factually divergent from *Edwards* so as to render the holdings mutually exclusive. An Informal Conference was, in

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[1] The claimant sought a rehearing of this Order. On rehearing, the court reversed and awarded attorney's fees based on a re-examination of the facts under which it concluded that the disputed issue had in fact been addressed at an Informal Conference therefore entitling the claimant's attorney's to his fee. The court did not reverse its position on the law, only on the facts as applied to the law. Staftex, 237 F.3d 409.

fact, held in that case and a recommendation issued. The only issue was whether the recommendation was sufficient to warrant fee shifting under § 928(b). Not only was it found to be sufficient, the panel held that the employer had procedurally waived the objection. *National Steel*, 606 F.2d at 882. This is, then, vastly different from the facts in *Edwards*, where there was no Informal Conference or recommendation and, thus, no attempt by the claimant to resolve the claim prior to resort to formal adjudication. The two cases are therefore readily distinguishable on their facts and cannot support the contention that there is a valid circuit split on this issue worthy of this Court's review.[2]

Next, Claimant contends that *National Steel* is the "seminal" decision on the issue of attorney's fees pursuant to § 928(b) of the Act, and the Fourth Circuit's failure to address it renders its decision in error. However, over a decade later, the Ninth Circuit addressed the issue directly in *Todd Shipyards Corp v. Director, OWCP*, 950 F.2d 607 (9th Cir. 1991), a Ninth Circuit case to which the Fourth Circuit did indeed cite in support of its conclusion.

The *Todd Shipyards* panel thoroughly reviewed the congressional history of § 928(b) and reached the conclusion that "Section 928(b) authorizes a payment of attorney's fees only if the employer refuses to pay the amount of compensation recommended by the Claims Examiner following an informal conference."

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[2] Contrary to the Petitioner's assertion on brief, the panel in *National Steel* did not either cite or discuss the legislative history of the statute. *Pet. Brief at 12.*

Id. at 610. The Ninth Circuit explained: "[w]hile we believe that the intent of Congress is clear from a plain reading of the words used in Section 928(b), the legislative history explains unequivocally the very limited scope of attorney's fees awards under the statute." *Id.* In so doing, it quoted the history specific to § 928(b), which is conspicuously absent from Petitioner's Brief:

> A new provision is added dealing with cases where payment of compensation is tendered and an unresolved controversy develops about the amount of additional compensation, *despite the written recommendation of the deputy commissioner.* The provision directs an award of attorney's fee... *where the employer or carrier has refused to accept the recommendation....*
>
> *In all cases other than those specified above,* attorneys' fees may not be assessed against the employer.

Id. (quoting from H.R. Rep. No. 92-1441, 92nd Cong., 2nd Sess. 3, reprinted in 1972 US Code Cong. & Admin News 4698, 4717)(emphasis added by the Ninth Circuit).[3]

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[3] In support of its conclusion, the Ninth Circuit relied on a case out of the Fourth Circuit Court of Appeals, *Kemp v. Newport News Shipbuilding*, 805 F.2d 1152, 1153, n. 3 (4th Cir. 1986), wherein the Fourth Circuit stated that Congress intended that disputes first be resolved without the parties having to rely on assistance other than that provided by the Department of Labor.

Thus, contrary to the present assertion by the Claimant, *Todd Shipyards*, which was decided after *National Steel*, must be considered the "seminal decision" on this issue. As the Fourth Circuit's decision in *Edwards* is consistent with *Todd Shipyards*, there is no circuit split at all, much less one sufficient to render this case worthy of this Court's consideration.

Claimant also contends that the Fourth Circuit's *Edwards* decision is in conflict with another decision by the Fourth Circuit, *Newport News Shipbuilding and Dry Dock Co. v. Firth*, 134 F.3d 363, 1998 WL 29255 (4th Cir. 1998) (unpublished). As noted, this is an unpublished decision and has little, if any, precedential value, even within the Fourth Circuit, much less outside the circuit. *See* FRAP 4th Cir. Local Rule 36(c) (court will not cite an unpublished disposition absent unusual circumstances, and citation by parties is disfavored).

Additionally, the *Firth* panel did not even decide the issue, but simply alluded to it in a footnote. *Firth*, 134 F.3d at fn. 5. The reference obviously had little impact on the *Edwards* panel as it was ignored completely, despite having been briefed. It is, then of no moment.

There being no valid circuit split, either internally to the Fourth Circuit or externally in the nation, Respondent respectfully suggests that Claimant's petition for writ of certiorari be denied.

II. THIS CASE FAILS TO ADDRESS AN IMPORTANT ISSUE OF GENERAL IMPORTANCE SUFFICIENT TO WARRANT REVIEW BY THIS COURT.

In the alternative, even if this Court determines that there is a valid circuit split as a result of this decision, such subtle distinctions in application of the statute are tolerable and fail to render the issue worthy of this Court's review.

This case simply does not present an issue with ramifications beyond its effect on a small percentage of parties adjudicating claims under the LHWCA. As the Claimant so readily points out in his petition, "some directors . . . rarely hold informal conferences . . . other . . . always hold them." The differences in the informal processing of Longshore claims are not a matter of national importance to a wide range of litigants; rather it is a regional concern. Thus, variations among different parts of the country for implementing the plain language of the statute are acceptable.

For example, the District Director within the region relevant to these parties has historically not held Informal Conferences in certain cases. However, as noted by the Claimant, such is not true for every District Director. There are some regions in which informal processing of longshore claims is mandatory. Further, as noted by the Fourth Circuit, the power of the District Director to forgo the informal procedures proscribed in the regulations cannot "nullify those mandatory statutory conditions" expressly stated in the statute. *Edwards*, 328 F.3d at 320 (citations omitted).

Thus, because District Directors in different areas deal with the informal procedures of adjudicating a claim differently, the relevance of this particular case does not extend beyond this district. It can therefore not be found to involve principles, the settlement of which is of general interest or importance to the public at large.

To the contrary, Claimant misstates the "importance" of this decision. It is not the "arbitrary customs of the local directors" that impacts the litigants and their respective counsel; rather it is the importance given to the informal proceedings of Longshore claims that has collective relevance. In furthering the intent of the Act, the plain language of § 928(b) will not result in "injustice to claimants seeking benefits under the LHWCA" as Claimant contends. Claimants will still continue to receive the benefits to which they are entitled under this Act; they are unaffected by this line of decisions concerning attorneys fees.

Of "national importance" is not the effect on "competent counsel" that the plain language of the Act will have; rather it is the increase in the informal processing of, and more expeditious resolution of disputed claims that will result. The Act was not intended to line the pockets of "competent counsel;" rather it is to ensure that legitimately injured longshoremen and harbor workers are adequately compensated for their injuries in a timely manner. The *Edwards* decision will do nothing to impede that lofty goal, and will in fact further the intent of the legislation. Therefore, whether attorneys are awarded a fee at the expense of employers where there is no

Informal Conference or a written recommendation by the District Director is not a matter of national importance worthy of this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 05-61

In the Supreme Court of the United States

BENNY R. EDWARDS, PETITIONER

v.

VIRGINIA INTERNATIONAL TERMINALS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals was correct to hold that petitioner's counsel was not entitled to an attorney's fee under Section 28(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 928(b), because the district director did not hold an informal conference or issue a written recommendation on the supplemental claim.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-16) is reported at 398 F.3d 313. The Benefits Review Board's order on motion for reconsideration (Pet. App. 17-21) and initial decision (Pet. App. 22-30), as well as the initial decision of the administrative law judge (Pet. App. 31-34), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 2005. A petition for rehearing was denied on April 14, 2005 (Pet. App. 1-2). The petition for a writ of certiorari was filed on July 5, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, provides for two situations in which a claimant may recover from the employer "a reasonable attorney's fee" following successful prosecution of his or her claim. 33 U.S.C. 928. First, a fee award is authorized when the employer declines to pay any compensation within 30 days of receiving written notice of the filing of a claim for compensation and the claimant successfully prosecutes the claim with the help of an attorney. 33 U.S.C. 928(a). Second, a fee award may be authorized in certain circumstances when the employer pays compensation without an award and a controversy develops over the amount, if any, of additional compensation due. 33 U.S.C. 928(b). In that situation, the LHWCA instructs the deputy commissioner to set the matter for an informal conference and to recommend in writing a disposition of the controversy.[1] If the employer refuses to accept the written recommendation, it must pay within 14 days any additional compensation to which it believes the claimant is entitled. If the claimant refuses to accept the payment and, with the help of an attorney, is awarded compensation in excess of the amount offered by the employer, the claimant is entitled to a reasonable attorney's fee based on the difference between the amount awarded and the amount tendered. 33 U.S.C. 928(b).

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[1] Regulations promulgated by the Department of Labor use the term "[d]istrict [d]irector" in lieu of the statutory term "[d]eputy [c]ommissioner." See 20 C.F.R. 701.301(a)(7); 70 Fed. Reg. 43,233 (2005).

2. On February 22, 2002, petitioner Benny R. Edwards was injured while working as an employee of respondent Virginia International Terminals, Inc. (VIT). Pet. App. 4. On February 28, 2002, he filed a claim for benefits under the LHWCA. *Ibid.* VIT filed a "Payment of Compensation Without Award" form with the Office of Workers' Compensation Programs (OWCP) on March 18, 2002, and voluntarily paid temporary disability benefits to petitioner for the period from February 26, 2002, until March 31, 2002, when it terminated payments because petitioner had been cleared to work. *Id.* at 5.

On July 23, 2002, petitioner requested additional benefits for the period from February 23 through 25, 2002, and asked for an informal conference to resolve the request. Pet. App. 5, 24.[2] By letter dated August 1, 2002, the district director requested supporting medical evidence from petitioner. *Ibid.* Petitioner refused and asked for a formal adjudication. On August 22, 2002, the district director forwarded the case to the administrative law judge (ALJ) without a written recommendation. *Id.* at 6, 24-25. On August 27, 2002, however, VIT paid the claimant benefits for the three contested days. *Id.* at 6, 25. The ALJ subsequently terminated the proceeding because the dispute had been resolved. *Id.* at 25, 32.

3. Petitioner's counsel requested an attorney's fee in the amount of $117 for work performed between August 26, 2002, and September 23, 2002, before the ALJ. Pet. App. 6, 25, 32. VIT objected on the ground that the district director had not held an informal conference as required by 33 U.S.C. 928(b). Pet. App. 6, 25, 32. The

[2] Petitioner also requested reimbursement for some medical expenses, which VIT agreed to pay. Pet. App. 24.

ALJ agreed, finding that VIT was not liable for petitioner's attorney's fees under Section 28(b) of the Act, 33 U.S.C. 928(b), because no informal conference had been held and the district director had never made a written recommendation. Pet. App. 31-34.

4. The Benefits Review Board (BRB) reversed, finding VIT liable for attorney's fees under Section 28(a) without reaching the issue of Section 28(b) liability.[3] It based its decision on a Fifth Circuit decision holding that an employer's prior voluntary payment should not preclude liability for attorney's fees under Section 28(a). Pet. App. 27-29 (discussing *Pool Co.* v. *Cooper*, 274 F.3d 173 (5th Cir. 2001)).[4] Reciting the facts of this case, the BRB reasoned that "claimant successfully prosecuted his claim before the administrative law judge" and therefore was entitled to attorney's fees under Section 28(a). *Id.* at 29. The BRB remanded the case to the ALJ to determine the fees due. *Ibid.*

On VIT's request for reconsideration, the BRB vacated the portion of its decision remanding the case to the ALJ and awarded petitioner $117 in fees under Section 28(a) for counsel's work before the ALJ and, additionally, $1581 for counsel's work on the appeal. Pet. App. 17-21.

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[3] The BRB consists of five members appointed by the Secretary who are "authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under [the LHWCA]." 33 U.S.C. 921(b)(3).

[4] In *Pool*, the employer voluntarily paid benefits before any claim was filed, but controverted a claim for additional benefits that was filed after the voluntary payments terminated. The case went before an ALJ who awarded the additional benefits. Pet. App. 28.

5. On February 16, 2005, the court of appeals reversed the BRB's decision on the ground that neither of the Act's fee-shifting provisions authorized an award of attorney's fees under the specific facts of this case. Pet. App. 3-16.

The court reasoned that Section 28(a) by its terms applies only when the employer has refused to pay "*any* compensation." Pet. App. 9 (quoting 33 U.S.C. 928(a)). According to the court, the phrase "filing a claim" in Section 28(a) "refers to a formal action that initiates a legal proceeding, rather than an informal action that seeks to alter or amend a pre-existing settlement on a prior claim," so that, here, the informal request for "modification of the benefits received for the same injury" did not meet the formal filing requirement of Section 28(a). *Id.* at 10-11. Further, the court explained, adjacent statutory subsections that refer to the same subject matter must be read *in pari materia*, but construing Section 28(a) as applicable to supplemental claims would render Section 28(b) superfluous. *Id.* at 11-12. Finally, the court distinguished the Fifth Circuit's decision in *Pool* on the ground that, although the employer in that case had voluntarily paid benefits, the employee had then filed a formal claim for benefits, after which the employer refused to pay any further compensation. This, the court said, "unambiguously fulfilled" Section 28(a)'s conditions for a formal claim followed by a refusal to pay within 30 days of the claim. In contrast, the court reasoned, in this case "VIT voluntarily paid benefits within 30 days *after* [petitioner's] formal claim, thereby rendering [Section 28(a)] inapplicable." *Id.* at 12-13.

Turning to the second fee-shifting provision, the court noted that under the plain language of Section

28(b), attorney's fees may be awarded only when there has been an informal conference followed by a written recommendation that is rejected by the employer, and the employee thereafter achieves a greater award with the help of an attorney. Pet. App. 13-14. The failure to hold an informal conference or to issue a written recommendation was therefore fatal to petitioner's claim for attorney's fees under Section 28(b). *Id.* at 14-16.

ARGUMENT

The court of appeals' decision regarding Section 28(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 928(b), is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of petitioner's fact-bound claim is not warranted.[5]

1. At issue in this case is petitioner's entitlement to $117 in attorney's fees. Pet. 7; Pet. App. 32. The court of appeals correctly decided, however, that petitioner was not eligible for this fee award under Section 28(b).

Applying plain language analysis, the court of appeals correctly concluded that the four conditions set forth in Section 28(b)—including holding an informal conference and issuing a written recommendation—must be fulfilled before an attorney's fee may be awarded. Pet. App. 13-15. On the facts of this case, moreover, the court reasonably concluded that those conditions were not satisfied in full. *Id.* at 14-16. Accordingly, the court properly concluded that petitioner

[5] The petition does not challenge the court of appeals' decision denying attorney's fees under 33 U.S.C. 928(a). Accordingly, the Director expresses no view on whether the court correctly decided to reverse the BRB's holding that petitioner was entitled to attorney's fees under that provision.

was not eligible for an award of attorney's fees under Section 28(b).

2. Contrary to petitioner's principal contention (Pet. 10-15), the decision below does not clearly conflict with the decisions of the Ninth Circuit with respect to the question whether an informal conference and written recommendations are mandatory prerequisites to the award of attorney's fees under Section 28(b).[6] In *National Steel & Shipbuilding Co.* v. *United States Dep't of Labor*, 606 F.2d 875 (9th Cir. 1979), which is the primary basis for the claimed circuit conflict, the court affirmed an attorney's fee award when the district director held an informal conference but did not issue a written recommendation following the conference. Noting the congressional intent to limit attorney's fee awards to cases in which parties dispute the existence or extent of liability, the court stated, "[w]e do not believe that the statute contemplates the making of a written recommendation by the deputy commissioner as a precondition to the imposition of liability for attorney's fees." *Id.* at 882 (discussing H.R. Rep. No. 1441, 92d Cong., 2d Sess. 3 (1972)). Further, the court reasoned that even if the "written recommendation" prerequisite was necessary, it was met, in that it was "evident" that the parties would have rejected any explicit recommendation because they had failed to reach an agreement at the informal conference, so that instead "[t]he recommendation following the informal conference * * * was for the

[6] In the question presented (Pet. i) and at various other points in the petition (at 8-9, 11, 18-20), petitioner frames the issue solely in terms of whether an informal conference is a prerequisite, but elsewhere (Pet. 10, 12, 14-17) he appears to give equal consideration to the decisions' treatment of whether a written recommendation is also a prerequisite.

matter to 'be referred'" for a formal ALJ hearing "'at the request of both parties.'" *Ibid.* (citation omitted). Under those circumstances, the court concluded that Section 28(b) provided the basis for an attorney's fee award.[7]

Unlike the parties in *National Steel*, petitioner and respondents did not participate in an informal conference, and thus the two cases do not squarely conflict. There is no way to predict how the Ninth Circuit would have decided *National Steel* had there not been an informal conference. If anything, the fact that the court relied on the conduct of the parties at the conference as evidence that a written recommendation would have been rejected suggests that the informal conference was critical to the disposition of that case.[8]

Moreover, in *Todd Shipyards Corp.* v. *Director, OWCP*, 950 F.2d 607 (1991), a case expressly relied upon by the court of appeals below (Pet. App. 14), the Ninth Circuit subsequently distinguished *National Steel* and clarified the congressional intent behind Section 28 in a manner consistent with the Fourth Circuit's decision here. In that case, the only disputed issue following the informal conference was the claimant's entitlement to an attorney's fee for services rendered before the conference ended; the parties had reached an agreement at the

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[7] Unlike in this case, *National Steel* proceeded to a formal hearing, after which the ALJ granted (and the BRB and appeals court affirmed) the higher compensation sought by the claimant. *National Steel*, 606 F.2d at 877-878.

[8] Petitioner errs in relying (Pet. 13-14) on a footnote in an unpublished decision, *Everitt* v. *Director, OWCP*, 107 Fed. Appx. 750, 753 n.4 (9th Cir. 2004) (citing *National Steel*, 606 F.2d at 882). An unpublished decision does not establish binding circuit precedent. See 9th Cir. R. 36-3.

informal conference on claimant's entitlement to disability benefits. 950 F.2d at 608. The court held that a fee award was not authorized in those circumstances, because Section 28(b) authorizes an attorney's fee only when the record shows that, following an informal conference, the employer refused to accept the written recommendation of the claims examiner. *Id.* at 610. The court distinguished the case from *National Steel*, in which the parties continued to dispute "liability on the amount of compensation to be paid *after the informal conference.*" *Id.* at 611 (emphasis added). The court explained:

> While we believe that the intent of Congress is clear from a plain reading of the words used in [Section 28(b)], the legislative history explains unequivocally the very limited scope of attorneys' fees awards under the statute.
>
> "A new provision is added dealing with cases where payment of compensation is tendered and an unresolved controversy develops about the amount of additional compensation, *despite the written recommendation of the deputy commissioner.* The provision directs an award of a reasonable attorney's fee . . . *where the employer or carrier has refused to accept the recommendation.* . . ." In all cases other than those specified above, attorneys' fees may not be assessed against the employer.

Id. at 610 (quoting H.R. Rep. No. 1441, *supra*, at 3). Not only does this explanation call into question the continued viability of *National Steel's* holding regarding the dispensability of the written-recommendation requirement, but the Ninth Circuit's analysis is completely consistent with the reasoning of the Fourth Circuit below.

3. Petitioner's assertion (Pet. 15-16) that the decision below conflicts with the Fourth Circuit's prior unpublished decision in *Newport News Shipbuilding & Dry Dock Co.* v. *Firth*, No. 96-2547, 1998 WL 29255 (Jan. 28, 1998) (134 F.3d 363 (Table)), is incorrect and undeserving of this Court's review. Even if true, an intra-circuit conflict, and particularly one in which a published decision purportedly conflicts with an earlier, unpublished decision, does not warrant this Court's review. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957); cf. 4th Cir. R. 36(b) and (c). In any event, the footnote in *Newport News* upon which petitioner relies is dicta, because the court ultimately held that Section 28(b) "is inapplicable and does not provide a basis for the ALJ's initial fee award." *Newport News*, 1998 WL 29255, at *3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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